IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

OMP(M) No.15 of 2000,
Arbitration Case No.1 of 2002,
Arbitration Case No.2 of 2002 &
Arbitration Case No.67 of 2003.

Judgments reserved on:

Date of decision: 9.1.2007

HPSEB ….Objector/petitioner.

-Versus-

M/s.SAB Industries Ltd. ….Non-objector/Respondent

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

Whether approved for reporting?

For the Petitioner: Mr.K.D.Sood, Advocate in OMP(M) No.15 of 2000, Arbitration Case No.1 of 2002, Arbitration Case No.2 of 2002. Mr.J.S.Bhogal, Senior Advocate with Mr.Suneet Goel, Advocate in Arb.Case No.67 of 2003.

For Respondent: M/s.J.L.Gupta & Kr.Kuldip Singh, Senior Advocates with Mr.K.S.Kanwar, Advocate.

Deepak Gupta, J.

This judgment shall dispose of four separate objections filed against four separate awards since all these awards are between the same parties and arise out of the same contract and some of the questions involved are common to all the cases.

The Objector H.P. State Electricity Board (hereinafter referred to as the Board) had taken up the execution of the Gaj Hydel Project. The Board entered into an agreement with S.A. Builders which was

later on re-named as SAB Industries Ltd. (hereinafter referred to as the Contractor). The Board vide Contract No.1 of 89 dated 6.2.1989 awarded construction of various civil works in favour of the contractor. The contract agreement was signed between the parties on 6.2.1989 and the stipulated time for completion of the works was 3 years. The total tendered cost of the project was Rs.4,83,41,997/-. Admittedly 3 time extensions with escalation were granted to the contractor by the Board up to 31.3.1995. Extension was also granted from 1.4.1995 to 30.9.1995 vide letter dated 24.11.1995 but in this letter the Board did not grant escalation and also reserved the right to claim liquidated damages. It is also not in dispute that the contractor applied for extension of time for the period 1.10.1995 to 31.3.1996 but this request was rejected by the Board on 31.5.2000. It is also not disputed that the actual date of completion of the work was 25.3.1996. The final bill was submitted by the Contractor on 26.12.1997/30.12.1997. Various deductions were made by the Board. Disputes arose between the parties even during the pendency of the contract and at various times different disputes were referred to arbitration of different arbitrators. Some of the awards have attained finality but four of the awards have been challenged under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act).

Before dealing with the individual cases and the various contentions raised by the parties it would be pertinent to mention that the present objections in all the cases have been filed under the Arbitration and Conciliation Act, 1996(hereinafter referred to as the

Act of 1996). Under the Act of 1996 an application for setting aside the arbitral award can be filed under Section 34 and the grounds for setting aside the arbitral award are set out in sub-section (2) of the aforesaid Section which read as follows:

"**34.Application for setting aside arbitral award.-**

(1)xxxxxxxxxx

(2)An arbitral award may be set aside by the Court only if—

(a)the party making the application furnishes proof that—

(i)a party was under some incapacity; or

(ii)the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii)the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv)the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v)the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b)the Court finds that—

(i)the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii)the arbitral award is in conflict with the public policy of India.

Explanation.- Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81."

Section 31(3) of the Act of 1996 provides as follows:

"**31,Form and contents of arbitral award.-**

(1)&(2) xxxxxxxxxx

(3)The arbitral award shall state the reasons upon which it is based, unless----

(a)the parties have agreed that no reasons are to be given, or

(b)the award is an arbitral award on agreed terms under section 30."

This section has to be distinguished from the provisions of the Arbitration Act, 1940 under which an award of the Arbitrator could only be set aside on the grounds mentioned in Section 30 of the Act which reads as follows:

"**30.Grounds for setting aside award.-**Any award shall not be set-aside except on one or more of the following grounds, namely:-

(a)that an arbitrator or umpire has misconducted himself or the proceedings;

(b)that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c)that an award has been improperly procured or otherwise invalid."

It is thus clear that though under the Act of 1940 reasons were not necessary but under the Act of 1996 the Arbitral Tribunal must give its reasons for making the award.

Various judgments have been cited at the Bar before me. It is not necessary to deal with each and every judgment. Some of the judgments relate to the Act of 1940 and some relate to the Act of 1996.

In **K.P. Poulose v. State of Kerala and another, AIR 1975 SC 1259,** the apex Court while considering the scope of the term mis-conduct in Section 30 of the Act of 1940 held as follows:

"6.Under Section 30(a) of the Arbitration Act an award can be set aside when an Arbitrator has misconducted himself or the proceedings. Misconduct under Section 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw2 abundant light on the controversy to help a just and fair decision. It is in this sense that the Arbitrator has misconducted the proceedings in this case……"

In my opinion, this authority would also apply to Arbitration awards announced under the 1996 Act since if the Arbitrator ignores material documents or totally mis-reads the evidence itself the award would be against the public policy of India.

In **Indian Oil Corporation Ltd. vs. Indian Carbon Ltd. (1988) 3 SCC 36,** the apex Court was dealing with the question as

to what is meant by the phrase 'reasoned award'. Under the 1940 Act it was not incumbent for the Arbitrator to give a reasoned award. However, in case the terms of the arbitration itself laid down that the award should be a reasoned award the arbitrator was bound to give reasons in his award. In this case the Supreme Court held as follows:

> "10……The reasons that are set out must be reasons which will not only be intelligible but also deal with the substantial points that have been raised. When the arbitration clause required the arbitrator to give a reasoned award and the arbitrator does give his reasons in the award, the sufficiency of the reasons depend upon the facts of the particular case. He is not bound to give detailed reasons. The court does not sit in appeal over the award and review the reasons. The Court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous."

In **Vishwanath Sood vs. Union of India and another, AIR 1989 SC 952,** the apex Court held that under the Act of 1940 it was not necessary to give reasons for the award.

In **Associated Engineering Co., vs. Government of Andhra Pradesh and another, AIR 1992 SC 232,** the apex Court while considering the scope of interference held as follows:

> "….Where it is apparent not by construction of the contract but by merely looking at the contract that the umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award, it is an error going to the root of his jurisdiction….

> ….The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.
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> ……If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such jurisdictional error needs to be proved by evidence extrinsic to the award."

In **Jajodia (Overseas) Pvt.Ltd. vs. Industrial Development Corporation of Orissa Ltd. (1993) 2 SCC 106,** the apex Court was considering the question as to what is meant by a speaking or reasoned award. The Court held as follows:

> "8.If is, we think, necessary first, to clear some cobwebs. A speaking or reasoned award is one which discusses or sets out the reasons which led the arbitrator to make the award. Setting out the conclusions upon the questions or issues that arise in the arbitration proceedings without discussing the reasons for coming to these conclusions does not make an award a reasoned or speaking award. The arbitrator has in the award before us only answered the issues that were framed. He has not discussed or set out the reasons for the answers. The award is, therefore, not a speaking or reasoned award."

This authority will apply as far as the 1996 Act is concerned since this Act itself requires that reasons should be given.

In **Tarapore & Co. vs. State of M.P., (1994) 3 SCC 521,** the Apex Court decided two questions which are germane to the present case and held as follows:

> "An arbitrator cannot travel beyond the contract, if an arbitrator acts beyond jurisdiction, the same would amount to misconduct because of which the award would become amenable of being set aside by a court…….
>
> If an authority would lack jurisdiction in the sense that the subject-matter is not amenable at all to its decision, i.e. the case be of patent lack of jurisdiction acquiescence of the parties would not be material inasmuch as by agreement jurisdiction cannot be conferred…..
>
> If a challenge is made to the award on the ground that the arbitrator has no jurisdiction, the only way to test the correctness is to look into the agreement itself because the jurisdiction of the arbitrator flows from the reference and a reference can be only with regard to such disputes which are contemplated by the agreement……

> Payment of wages as per the rates fixed under the Minimum Wages Act being statutory obligation and the terms of the contract being silent about payment of minimum wages, as the relevant term speaks of "fair wages", which concept is different from minimum wages, it must be held that insofar as increased payment on account of rise in the rates of minimum wages is concerned, the parties were not in any sort of agreement—express or implied to reimburse the same. The appellant-contractor paid as per these rates not pursuant to any term of the contract but because of the mandate of law….."

In **Rajasthan State Mines & Minerals ltd. vs. Eastern Engineering Enterprises and another, (1999) 9 SCC 283,** the apex Court summarised the entire law relating to the objections filed uner the 1940 Act in the following terms:

> "44.From the resume of the aforesaid decisions, it can be stated that:
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> (a) It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.
>
> (b) It is not open to the court to admit to prove the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.
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> (c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted or his adjudication then the court cannot interfere.
>
> (d) If no specific question of law is referred, the decision of the arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide

the question incidentally. In a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of a non-speaking award, the jurisdiction of the court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a

wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in **Continental Construction Co. Ltd. vs. State of M.P. (1988) 3 SCC 82,** by relying upon the following passage from **Alopi Parshad v. Union of India, AIR 1960 SC 588,** which is to the following effect: (SCC p.88, para 5)

"There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous."

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law."

As far as the Act of 1996 is concerned the scope of interference by the Court in an arbitral award under Section 34 of the Act has been the subject matter of a number of decisions. The leading decision on the point is **Oil and Natural Gas Corporation Ltd. vs. SAW Pipes Ltd., AIR 2003 SC 2629,** wherein after considering the entire law and all the provisions the apex Court held as follows:

> "30…….Further, for achieving the object of speedier disposal of dispute, justice in accordance with law cannot be sacrificed. In our view, giving limited jurisdiction to the Court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice.
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> 31.Therefore, in our view, the phrase 'public policy of India' used in S.34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in

Renusagar's case (supra(), it is required to be held that the award could be set aside if it is patently illegal. Result would be—award could be set-aside if it is contract to:-

(a) fundamental policy of India law; or

(b) the interest of India; or

© justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

In the light of the law discussed above each of the matters is being taken up separately.

OMP(M) No.15 of 2000:

In this case the Arbitrator vide his award dated 7th September, 1999 has awarded a sum of Rs.9,37,128/- in favour of the contractor and has further awarded simple interest @ 12% p.a. on this award amount from the date of reference to the date of the award. The rest of the claims of the contractor were rejected and the claims of the Board were also rejected.

The Board has now filed objections to this award. The contractor had laid various claims before the Arbitrator. The Arbitrator awarded claims on account of cement variation for the period October, 1992 to September, 1994 amounting to Rs.7,03,781/-. In addition thereto he has awarded a sum of Rs.1,14,047/- for the claim on account of concrete work in super structure of power house. He has also awarded Rs.1,19,300/- on

account of escalation. The total amount awarded is Rs.9,37,128/- on which he has awarded simple interest as aforesaid.

The first objection of the Board is with regard to claim amount of cement variation in concrete works. The Arbitrator has come to the conclusion that the cement variation upto September, 1992 has already been awarded in favour of the contractor in the award passed by Er.Kaushal dated 16th August, 1993. This award has been implemented by the Board. The Arbitrator has come to the conclusion that the cement contents have increased in weight by 5% and the labour rate had increased from Rs.15/- as at the time of tendering of work to Rs.22/- and therefore as on October, 1992 he has analysed the rate per bag to be Rs.107.12 per bag and awarded Rs.7,33,781/- on any count. This is a reasoned award and I do not find that the award of the Arbitrator is perverse on this count. Therefore, it calls for no interference.

The Arbitrator has awarded a sum of Rs.1,14,047/- on account of concrete works. He while coming to his conclusions made the analysis for the rate of concrete and has analysed the rates in accordance with certain norms. Here also it cannot be said that the award is against the public policy of India and hence this portion of the award is also upheld.

The main dispute in the present case relates to Claim No.7 wherein the Arbitrator has awarded escalation and while assessing the escalation has made the calculations by holding that the contractor was bound by the letter of the respondent board dated 7.6.1995.

Mr.K.D.Sood learned counsel appearing on behalf of the Board submits that this portion of the award is totally illegal and against the public policy of India. He submits that the said portion of the award is against the judgment delivered by this Court in **M/s.Hydel Construction Ltd. vs. HPSEB, 1999 (3) Shim. L.C. 10.**

It would be pertinent to mention that Clause 19-A of the contract entered into between the parties reads as follows:

"CLAUSE-19A: MINIMUM WAGES:

(a) The contractor shall pay not less than the minimum wage(s) for Kangra Distt. notified by H.P. Govt. & HPSEB from time to time for various types of labourers engaged by him on the work.

(b) The contractor shall, notwithstanding the provision of any contract to the contrary, cause to be paid not less than minimum wage to labourers indirectly engaged on the work, including any labour engaged by his sub-contractors in connection with the said work as such labourers had been in his immediate employment.

(c) In respect of all labour directly or indirectly employed in the works for performance of the contractor's part of this agreement contractor shall comply with or cause to be complied with the HPPWD/HPSEB contractor's labour regulations made by the Govt./HPSEB from time to time in regard to payment of wages, wage period, deductions from wages recovery of wages not paid and deductions unauthorisedly made. Maintenance of wage books or wage slips publication of scale of wages and other terms of employment inspection and submission of periodical return and all other matters of the like nature."

The Board had issued a letter on 7.6.1995 which reads as follows:

> "HIMACHAL PRADESH STATE ELECTRICITY BOARD
> OFFICE ORDER No.7/HPSEB(SECTT)IR-94 Dated:7.6.95.
>
> The H.P. State Electricity Board is pleased to fix the daily wages rates of the different categories of daily rated workers indicated against each in the enclosed Annexure w.e.f. 1.1.94.
>
> These rates will be uniformally applicable to all the areas including backward and tribal areas of the State. The orders regarding arrears of wages w.e.f. 1.1.94 to 31.3.1995 will be issued separately.
>
> Sd/
> Secretary,
> H.P.State Elecy.Board,
> Vidyut Bhawan,
> Shimla-171004"

The contention of the Contractor is that he was bound to pay the wages in terms of the aforesaid letter in view of the provisions of Clause 19-A and therefore escalation in labour rates has to be calculated by taking into consideration minimum wages of Rs.45.75 as fixed by the Board.

The case of the Board is that the minimum wages of Rs.45.75 were not notified vide letter dated 7.6.95 under the Minimum Wages Act and it has already been held in **Hydel Construction case (supra)** that the escalation has to be worked out by taking into consideration the minimum wages which are duly notified under the Minimum Wages Act and not the minimum wages which the Board may have made applicable by means of internal orders of the Board. Mr.Sood further urges that in fact in the present case the Contractor

has not proved nor led any evidence to show that he had paid minimum wages @ Rs.45.75 per day for the period January 1994 to September, 1994.

In **Hydel Construction case (supra)** the Court was dealing with virtually an identical question. The only difference is that in that case on 30.6.1982, the date of opening of tender the minimum wages notified under the Minimum Wages Act were Rs.7.25 per day whereas the Board by its internal order had notified the wages at Rs.8.25 per day. It was urged by the Board that on the date of the opening of tender the minimum wages fixed by the Board being Rs.8.25 per day, the tender had been submitted by taking the wages at Rs.8.25 per day and this amount had been accepted by the contractor in its running bill and therefore the escalation should be calculated by taking base rate at Rs.8.25 per day and not Rs.7.25 as notified under the Minimum Wages Act by the State. The contractor had urged that the rate notified or ordered to be paid by the Board did not amount to a notification fixing minimum wages under the Minimum Wages Act and therefore the base rate had to be taken at Rs.7.25 and not Rs.8.25. It would be pertinent to mention that Clause 19-A in the said case was identical to the clause in the present case. Dealing with both the contentions the Division Bench of this court held as follows:

> "46.The learned counsel for the Board has unsuccessfully tried to challenge the findings in the award with regard to Claim No.2, affirmed by the learned Single Judge, on the ground that the defect of Office Order dated 3.5.1982 that it was not published in the official Gazette, could be removed by

publication of its corrigendum dated 24.9.1992 in the official Gazette. The Notification dated 3.5.1982 remained still born for want of publication in the Official Gazette in which life could not be instilled by publication of its corrigendum substituting the words "immediate effect" with the words "with effect from 1.4.1982" giving the Office Order dated 3.5.1982 retrospective effect after more than 10 years. The procedure for fixing and revising the minimum wages is given in Section 5 of the Minimum Wages Act. Sub-section (2) of Section 5 of the Minimum Wages Act lays down that after following the procedure provided under sub-section (1), the Government shall "by Notification in the official Gazette fix, or as the case may be, revise the minimum rates of wages in respect of each scheduled employment, and unless such notification otherwise provides, it shall come into force on the expiry of three months from the date of its issue:" Therefore, the alleged revision of wages by order dated 3.5.1982 did not come into force for want of publication in the official Gazette. In view of this, the Corrigendum dated 24.9.1992 though published in the official Gazette was of no effect.

Otherwise also, under Section 5 of the Minimum Wages Act, the government did not have any authority to give retrospectivity to the revision of minimum wages effected by office order dated 3.5.1982. what to talk of fixing minimum wages or revision of minimum wages by notification issued under sub-section (2) of Section 5 of the Minimum Wages Act, even subordinate legislation cannot be made with retrospective effect unless it is so authorized by the legislature which has conferred that power. The law on this point has been laid down in The Income-tax Officer v. I.M.C. Ponnoose and others, AIR 1970 SC 385 at page 387. The above legal propositions have been reiterated in Bakul Cashew company and others v. Sales Tax officers, Quilon and another, AIR 1987 SC 2239, wherein it is categorically stated that the

authority which has the power to make subordinate legislation cannot make it with retrospective effect unless it is so authorised by the legislature which has conferred that power on it.

48. No doubt, it is mentioned in Clause 19-A (a) that the contractor shall pay not less than minimum wage(s) for Kinnaur District notified by the Himachal Pradesh Government/HPSEB engaged by him on the work but the perusal of Office Order dated 7.6.1982 and the endorsement made therein do not show that it has revised the minimum daily wage rate from Rs.7.25 to Rs.8.25, as provided under Section 5 of the Minimum Wages Act to make it legally enforceable. Apparently, it was only an executive order which could not over ride the statutory Notification dated 18.9.1981 fixing the minimum wage rate at Rs.7.25 which was further revised to Rs.8.25 with effect from 16.12.1982 by another statutory Notification. Moreover, there is nothing on the record to show that at the time of entering into the agreement, the office order dated 7.6.1982 was notified to the claimants that the minimum wage was Rs.8.25 at that point of time."

Faced with the aforesaid judgment Sh.J.L.Gupta, learned senior counsel appearing on behalf of the Contractor submits that the said case has no applicability to the facts of the present case. According to him the issue raised in Hydel Construction case was in relation to an order issued by the Board prior to the opening of the tender whereas in the present case all the orders are post contract and the notification of 7th June, 1995 issued by the Board whereby the minimum wages were increased to Rs.45.75 w.e.f. Ist January, 1994 whereas the contract had been entered into in 1989. This argument is without any force. I am bound by the judgment of the Division

Bench. The Division Bench has in no uncertain terms held that minimum wages could not have been increased retrospectively and had relied upon a number of Supreme Court judgments in this regard. The Division Bench while considering Clause 19-A has also come to the conclusion that the executive orders of the Board could not over-ride the statutory notification fixing minimum wages issued by the Government under the Minimum Wages Act. In the present case also the orders dated 7th June, 1995 issued by the Board is not a statutory order. No doubt it is an order passed by the Board but it cannot be said that the said order could over-ride the notification issued under the Minimum Wages Act.

It would also be pertinent to point out that the Contractor has failed to place any material on record to show that he had actually paid the arrears of wages to the workers from 1.1.1994. The order of the Board increasing the wages to Rs.45.75 per day was passed on 7th June, 1995 and it was made effective from 1.1.1994. The order has been quoted above.

Sh.Gupta has stated that letter dated 3.2.1996 issued by the Executive Engineer is proof of the fact that the Contractor has paid the minimum wages to the workers w.e.f. 1.1.94. The letter dated 3.2.1996 reads as follows:

"HIMACHAL PRADESH STATE ELECTRICITY BOARD

NO.GEN-AB-SAB/95-96-8133-34 Dated:3.2.1996

To

The superintending Engineer,
Projects Constn, Circle,
HPSEB, Dharamshala.

Sub:- Regarding minimum wages.

Ref:- M/s.S.A.Builders and Financiers Ltd., Chandigarh
Letter No.SAB/Gaj/96-77 dated 31.01.06.

Sir,

In this context, it is intimated that M/s. S.A. Builders Ltd., Chandigarh are paying wages to their workers not less than the minimum wages applicable to the HPSEB, workers notified vide Secretary HPSEB, Shimla office order No.7/HPSEB(Sectt.)/IR-94 dated 7.6.95 endorsed vide No.HPSEB(Sectt)/IR-5(A)/94-55445-56145 dated 7.6.95.

So far as the contract clause 19-A Chapter-IV part-I of the contract agreement No.1/89 dated 6.2.89 under which now the contractor is claiming the escalation on enhanced rates is concerned, it is intimated that contract clause 19-A (a) is silent regarding applicability of the minimum wages rates covered under the provision of minimum wages Act, 1940.

As per contract clause 19A(a) the contractor shall pay not less than the minimum wages notified by the HP Govt/HPSEB, from time to time. The HPSEB as well as HP Govt. are now paying the minimum rates of wages to their labourers @ 45.75 p. per day w.e.f. 1.1.94.

The necessary clarification/decision may please be conveyed to this office immediately as the contractor is pressing hard for releasing the payment of their escalation bill on enhanced rates please.

Yours faithfully,
Sd/-
Executive Engineer,
Gaj Const. Division,
HPSEB:Gharoh (Kangra)"

I have gone through this letter. No doubt in this letter the Executive Engineer has stated that the contractor is paying wages to the workers not less than the minimum wages applicable to the HPSEB as notified vide letter dated 7.6.1995, however, it is not clear on what basis the Executive Engineer had issued this letter. At best this letter shows that on 3.2.1996 the contractor was paying minimum wages fixed by the Board. In this letter no mention is made of the records verified or the period from which the contractor made this payment or whether the arrears were paid at all. The best evidence was the records of the contractor which could have shown as to what amount has been paid by the contractor to the labourers. This record has not been produced before the Arbitrator. The contractor has withheld the best evidence which was available with him and was within his control. There was nothing to prevent the contractor from leading evidence before the Arbitrator that he had actually paid this amount of enhanced wages especially the arrears. It would also be pertinent to mention that with regard to the arrears even the order dated 7.6.1995 clearly mentioned that orders regarding the arrears of wages would be issued separately. No orders regarding payment of arrears have been placed on record. One cannot loose sight of the fact that labourers are not permanent employees. The notification was issued on 7.6.1995 and the rates were made applicable from 1.1.1994. The Division Bench of this Court in **Hydel Construction case (supra)** had clearly laid down that there is no power to increase the minimum wages with retrospective effect. No evidence has been led to show that the

arrears of wages were paid to the workmen. The award of the Arbitrator is not only against the law laid down by this Court but is also based on no evidence.

As a consequence of the above discussion, I hold that the Arbitrator was not justified in awarding escalation on claims 3&4 by taking into account the notification dated 7.6.1995 issued by the respondent Board, since this was not a notification fixing minimum wages as per the Minimum Wages Act as clearly laid down in **Hydel Construction case (supra).** Consequently, the award of the learned Arbitrator in so far as he has awarded a sum of Rs.7,03,781/- on account of cement variation and Rs.1,14,047/- on account of concrete work done is upheld. However, escalation awarded in Claims 3&4 in so far as it relates to the escalation on account of minimum wages is set-aside and consequently the amount awarded against claim No.7 is reduced from Rs.1,19,300/- to Rs.11,711.89 or say Rs.11,712/-. Rest of the award is upheld.

Arbitration Case No.1 of 2002:

This case relates to the same Project. It would be pertinent to mention that under the terms of the agreement dated 6.2.1989 the Project was to be completed by 6th March, 1992. It is the admitted case of the parties that due to various hindrances the completion period of the Project was enlarged by the Board from time to time and the Board granted extension of time under Clause 5 of the Agreement as follows:

(i) From 8.3.1992 to 30.3.1993 vide letter dated 3.5.1994;

(ii) From 1.7.1994 to 30.11.1994 vide letter dated 12.1.1995;

(iii) From 1.12.1994 to 31.3.1995 vide letter dated 13.2.1995; and

(iv) From 1.4.1995 to 30.9.1995 vide letter dated 24.11.1995.

As far as the first 3 extensions are concerned, these extensions were granted with escalation meaning thereby that the claimant was entitled to the escalation as per the escalation clause in the agreement. As far as the last extension is concerned, according to the Board the said extension was with liberty reserved to the Board to claim liquidated damages. It would be pertinent to mention that when the Contractor did not complete the construction within the extended period up to 31.3.1995 the Chief Engineer (Projects) of the Board vide his letter dated 12.7.1995 came to the conclusion that the work was to be completed by the Contractor in an insufficient manner resulting in slow progress and therefore directed that the remaining work would be taken over and done at the risk and costs of the Contractor.

The Contractor filed OMP No.274 of 1995 challenging this order in this Court and obtained stay order on 20.7.1995. Thereafter, the Board moved an application for vacation of the stay order and the stay order was vacated by order of this Court dated 24.8.1995. Consequently, the remaining works were taken over by the Board vide communication dated 24.8.1995. The High Court thereafter referred the matter to arbitration.

The contractor filed various claims before the Arbitrator and the Arbitrator has rejected a number of the claims. The contractor claimed compensation as follows:

"DETAIL OF CLAIMS (ENDING 3/2001)

Sr.No.	Description	Amount in lakhs
1.	Claim for compensation of delay	82.50
2.	Claim on account of commitment charges	1.41
3.	Claim on account of escalation paid to IHP	0.24
4.	Claim on account of extra expenditure incurred	
	On establishment and over-head charges	6.310
5.	Claim on account of money(s) got blocked	292.878
6.	Claim on account of generation loss	1227.400
7.	Claim on account of difference in stock issue	
	Rate and contract issue rate of material after 9/95	12.041
8.	Detail of works executed departmentally at the	
	Risk and cost	13.50
9.	Claim on account of pre-suit pendent lite and	
	Future interest @ 24% per annum	-
10.	Claim on account of cost	1.00

Total Claim: Rs.1657.399.

Say Rs.1657 lacs

Say Rs.16.57 crores."

The first question which arises for decision in this case is whether the Board was justified in taking over the construction of the remaining works and whether the taking over of the remaining works by Board amounting to breach of contract. It would not be out of place to refer to the submissions of the contractor made before the Arbitrator. The Contractor submitted that the delay after June, 1994 was not attributable to any fault on his part but occurred due to the

facts that there was abnormal monsoon and floods during July, 1994. It was further submitted that the contractor had employed Kashmiri labourers on the Project and the security clearance of the labour took unduly long time. It was also submitted that on account of continuous rain during December, 1994, January, 1995 and February, 1995 and also due to non-availability of material like cement and steel and delay in payments the contractor could not complete the work by 31.3.1995.

The Arbitrator came to the conclusion that the Board did not make available vital input material such as cement, power, diesel and that there were road blocks due to rain and there was loss of time on account of security clearance and restoring the works due to flash floods in July, 1994 and, therefore, the contractor could not be blamed for not completing the work within time and as such the taking over of the work was unwarranted and uncalled for.

I have given my careful consideration to the arguments of Sh.K.D.Sood, learned counsel who has challenged this finding of the Contractor. In view of the law cited above it is absolutely clear that this Court cannot interfere in the findings of the Arbitrator even if it does not agree with them. While coming to the conclusion that the contractor was not to be blamed the Arbitrator has considered all relevant facts and circumstances. It is apparent that he has come to the finding that there were some factors beyond the control of either parties and there was some delay on the part of the Board and therefore the taking over was not justified. This finding of the Arbitrator calls for no interference. However, I want to make it

absolutely clear that this does not mean that the delay occurred due to the negligence of the Board. All that the Arbitrator found is that a number of factors contributed to the delay and the contractor cannot be held to be at fault.

In this case the contractor has admittedly not done the work after the taking over of the Project from him. The Board has submitted that it completed the remaining works of the project which had been long unfinished by the Contractor at a cost of Rs.38,86,496/-. As per the agreed rates the cost of this remaining work was Rs.20,99,585/-. The contention of the Contractor is that if it had done the work it would have earned some amount and since the work taken over is in breach of the contract the Contractor in terms of the contract is entitled to the cost of the remaining works minus the actual amount spent by the Board on the work.

The main dispute in this case which has been adjudicated upon by the Arbitrator is that whereas the Board in respect of 9843.3 bags of cement has shown the grouting work done to be contact grouting the same was claimed by the contractor to be pressure grouting and the contractor was held entitled to a sum of Rs.12,23,412.50 @ Rs.125/- per bag on account of pressure grouting. The Arbitrator has also awarded escalation on the total cost of work i.e. Rs.20,99,585/- as per the agreement rate and Rs.12,30,412.50 as awarded by him for pressure grouting i.e. a total sum of Rs.33,29,797.50 @ 71.29% with base date of October, 1988 to March, 1999 and has worked this amount to Rs.23,73,995.21. Thus, the Arbitrator has come to the conclusion that in case the claimant had done the work he would

have been entitled to claim Rs.57,03,925.71 from the Board and since the Board has only spent Rs.38,86,496/- on the work the claimant is entitled to Rs.18,17,457/- being the balance amount.

The first question which arises is whether pressure grouting was done or not. The Board has strenuously contested this finding of the Arbitrator. According to the Board as per item No.2.2.2 the Contractor was to provide concrete lining for the Head Race Tunnel. According to the Board, contact grouting is necessary for the purpose of providing lining and the item of contact grouting is included in concrete lining. The Board has submitted that as per the technical specifications of the contract the contact grouting was to be done at pressure not exceeding 2 k.g./$cm^{2.}$ The submission of the Board that pressure grouting is something different and is done in order to consolidate the rock mass along side the tunnel and pressure grouting has to be done at pressure ranging between 5 k.g./ cm^2 to 7.5 k.g./cm^2. According to the Board, the Contractor had done contact grouting up to the length of 1272 mt. and in the remaining part of the tunnel measuring 770 meters (which work was taken over by the Board) the contact grouting was done at the risk and cost of the respondent.

On the other hand the case of the respondent is that in the various meetings held between the two sides the officials of the Board had directed the contractor to do pressure grouting at pressures 1 to 1.5 k.g./ cm^2 . The main dispute is whether the grouting done was pressure grouting or contact grouting. It would be relevant to mention that this is a technical question and the

Arbitrator was best qualified and suited to decide this question. He after consideration of the various factors has come to the following conclusion:

> "Conclusion: Whereas the Respondent Board after the excavation of tunnel, obtained the views of the experts and Geologist and the specified grout pressure limiting to 0.75 kg/ cm^2 for the contact grouting and 1 kg-1.5 kg/ cm^2 for pressure grouting. The grouting carried out by the Respondent Board beyond 0.75 kg/ cm^2 was a pressure grouting and whereas the Respondent Board, did not make available the site order book to the claimant and the Arbitrator as discussed above. The respondent Project authorities must have adopted the grout pressure much beyond 2 kg/ cm^2 to make the tunnel periphery strong and safe by fully consolidating it. Therefore the grouting done by the Respondent Board for taken over works was pressure grouting beyond 0.75 kg/ cm^2 and not the contact grouting only.
>
> The quantity of the cement consumed as per documents submitted, for grouting is 10937 bags. Out of this quantity, 5% to 10% maximum could be consumed in a sound rocky tunnel media for contact grouting and balance 90% was consumed through pressure grouting. Thus cement quantity will be reduced by 10% for evaluating the cost of this Award."

The aforesaid conclusion of the Arbitrator is based on evidence. It cannot be said that the said conclusion is totally arbitrary or unsound. The Arbitrator was a technically qualified person. He has given reasons for reaching the conclusion. As already held by me above this Court cannot substitute its opinion for the opinion of the Arbitrator unless the same is perverse or totally arbitrary. In the present case it has not been shown that the

reasoning given by the Arbitrator is perverse or arbitrary. Therefore, in my opinion the award of the Arbitrator to this extent is valid.

The next question which has arisen in this case is with regard to the escalation on the contract amount of Rs.33,29,997.50 as worked out by the Arbitrator. The Arbitrator has worked out the escalation by taking into consideration the notification of the Board dated 7.6.1995 which I have dealt with in detail while dealing with OMP(M) No.15 of 2000 relating to payment of wages. I have already held that this notification cannot be made the basis since this was not a statutory notification fixing minimum wages under the Minimum Wages Act. Therefore, the finding of the Arbitrator that the wages of Rs.45.75 per day had come into force by virtue of the order dated 7.6.1995 w.e.f. 1.1.1994 is incorrect and not in accordance with the judgment of this Court in **Hydel Construction case (supra).** It is not denied that the notification of the H.P. Government fixing minimum wages was only issued on 6.11.1996. There is no evidence led by the contractor to show that he actually paid wages as fixed by the Board. The escalation awarded by taking into account the minimum wages @ Rs.45.75 per day by virtue of letter of the Board dated 7.6.1995 is totally illegal and is accordingly set-aside.

In fact in the present case the contractor has admittedly not done the work. He is claiming the amount on the ground that this is the amount which would have been payable to him if he had done the remaining work. Since the contractor has not paid the labour any wages, what to talk of enhanced wages, there is no ground to award

escalation in wages even otherwise. In case this escalation is set-aside then the total amount of Rs.33,29,997.50 payable to the claimant is less than the amount spent by the Board i.e. Rs.38,86,496/- on the remaining works and therefore the claimant is not entitled to any amount whatsoever in this case. The award of the Arbitrator is accordingly set-aside and the claimant is held not entitled to any amount whatsoever.

Arbitration Case No.2 of 2002:

In this case the questions involved are virtually identical to Arbitration Case No.1 of 2002 (supra). The Arbitrator in the present case has awarded a sum of Rs.12,37,500/- to the claimant on account of pressure grouting and has awarded escalation @ 71.29% amounting to Rs.8,82,213.75 i.e. a total amount of Rs.21,19,713.75. Out of this amount Rs.7,80,120/- has been deducted on account of the cost of cement and the total amount awarded is Rs.13,39,594.00. In this case also the main contentions raised by the Board are two fold; (i) that pressure grouting was not done and only contact grouting was done, and (ii) that the escalation made on the basis of the notification of the Board dated 7.6.1995 is totally illegal.

In view of the discussions made in respect of the similar claim in Arbitration Case No.1 of 2002 above, I hold that the Arbitrator was justified in awarding Rs.12,37,500/- on account of pressure grouting. However, he was not justified in awarding Rs.8,82,213.75 as escalation based on the minimum wages allegedly fixed by the Board vide letter dated 7.6.1995. Therefore, award of the Arbitrator in so far as he has awarded escalation by taking into account the

notification of the Board is set-aside. In this case also no evidence was led to show that the workers were actually paid the wages as fixed by the Board. It would not be out of place to mention that the wages were fixed by notification dated 7.6.1995 and were made applicable w.e.f. 1.1.1994. No evidence worth the name has been led to show that such wages were actually paid. Therefore, by setting aside the award of the Arbitrator on account of escalation, the claimant is only entitled to a sum of Rs.12,37,500/- less cost of Cement being Rs.7,80,120/- i.e. a sum of Rs.4,57,380.

As far as interest is concerned, I find that the Arbitrator has only relied upon the provisions of Section 7-B to award interest @ 18% p.a. Keeping in view the prevalent market rate of interest the rate of interest is reduced from 18% p.a. to 12% p.a.

Arbitration Case No.67 of 2003:

These objections have been filed against the award of the Arbitrator dated 16th June, 2003 whereby he has awarded various amounts to the contractor under different heads and has rejected the counter claim of the Board. Detailed arguments in this case were addressed on behalf of both the parties and reference was made to Clauses 2,3,5,8,9-B, 9-C, 10, 10-C, 12, 12-A and 25 of the Contract. The record of the Arbitrator as well as the proceedings before the Arbitrator were gone through in detail. Arguments were addressed item-wise as per the award of the Arbitrator and they are being dealt with accordingly.

(i)Fabrication and erection of steel products, item No.2(iii):

The contractor claimed Rs.18,000/- per MT against the rate approved by the Board of Rs.13,490/- per MT. Admittedly the quantity of fabrication and erection of steel products had extended beyond the deviation limits due to the change in the design of the surge shaft. The depth of surge shaft was increased from 17 mts. to 54 mts. and diameter was reduced to 5 mts to 4.5 mts. The reasons given by the Arbitrator for allowing an amount of Rs.81,432.56 under this head are as follows:

> "I have gone through the approved analysis of rates approved/applied by the respondent of Rs.13,490/- per MT, I differ with the rates so approved on account of the fact that no provision have been made for the carriage of the material from govt. store to workshop site. The rates of erection seems to be very much on the lower side with respect to exigencies on account of increase of depth of the structure. The contractor profit and the overhead charges provided in the analysis are (10+05)=15% where it should be 20%."

It has been argued on behalf of the Board that this award is not based on any reasons or evidence and is contrary to Clause 12(ii). Clause 12(ii) of the Agreement reads as follows:

> "(ii)If the rates for the additional, altered or substituted work are not specifically provided in the contract for the work, the rates will be derived from the rates for a similar class of work as are specified in the contract for the work. Provided always that if the rate for a particular part or parts of these items cannot be derived from the rates for a similar class work as specified in contract, the rate for such part or parts will be determined by the Engineer-in-Charge on the basis of

prevailing market rates, whose decision will be binding on the contractor."

It is submitted that the award of the Arbitrator does not show that he has done the analysis of rates in terms of the aforesaid clause. It was also urged that the rate will be determined by the Engineer – in-Charge whose decision will be binding on the contractor.

On the other hand on behalf of the contractor it has been urged that the Arbitrator has himself analysed the rates and he has rightly discarded the rates approved by the Engineer-in-Charge in view of the fact that no provision had been made for carriage of material from government store to workshop site. It is also urged that while fixing the rates the Engineer-in-Charge did not taken into account the fact that not only had the work increased but by increase in the depth of the shaft more labour would be required.

I have considered the submission of both the sides. The Arbitrator has not only considered the evidence but has also stated that in the analysis of rates given by the Board, no provision has been made for the cost of carriage of material from Government store to workshop. He has also come to the conclusion that the rate of erection awarded is on the lower side keeping in view the amount of increase of depth of the surge shaft. In his opinion the contractor should have been entitled to profit and over-head charges @ 20% instead of 15%. These are all reasons of the Arbitrator. The award has been passed after giving reasons and considering the entire material.

Keeping in view the aforesaid discussion and the law laid down by the apex Court in the various judgments cited above I am not inclined to interfere with regard to the award made on this item.

(ii)Items No.16, 29 and 34:

These claims relate to concrete items which were to be derived in terms of Clause 12(ii) of the agreement. The Arbitrator while assessing the rates has based his calculations on the award dated 16.8.1993 passed by Sh.O.C.Kaushal in favour of the contractor. It would be pertinent to mention that Sh.O.C. Kaushal in his award dated 16.8.1993 had fixed the rate for the M-10 concrete. This award admittedly was not challenged in any Court and had attained finality.

The contention of Sh.Bhogal in respect of these claims is that the Arbitrator has erred in basing his award on the previous award of Sh.O.C. Kaushal. According to Sh.Bhogal the Arbitrator is a creation of the agreement and is bound by the agreement entered into between the parties. He, therefore, submits that the Arbitrator was bound to analyse the rates in terms of Clause 12(ii) and could not have relied upon the award of Sh.Kaushal. He further submits that the earlier award was made under the Act of 1940 and there may have been many reasons for the Board not to have contested the Award.

On the other hand Sh.J.L. Gupta, learned senior counsel has submitted that the award of Mr.O.C. Kaushal has been made rule of the Court and therefore the Arbitrator was justified in fixing the rates of various concrete items on the basis of the earlier award.

The Award made on items 16, 29 and 34 cannot be said to be unreasonable. It is not disputed that in the earlier award Sh.O.C. Kaushal had fixed the rate for M-10 concrete. On the basis of these calculations the Arbitrator derived the rates for M-75, M-30 and M-25 concrete items. This was a matter of calculations and in my opinion the award of the Arbitrator is based on evidence (i.e. the earlier award). In case the Board was not satisfied with the award of Sh.Kaushal it would have challenged the said award. Admittedly no challenge was made to the award. Therefore, it has to be presumed that the Board accepted as correct the methodology applied by Sh.Kaushal. Once they have accepted the said award it clearly indicates that Sh.Kaushal had derived the rates in terms of Clause 12(ii). Therefore, further derivation of rates of other items by basing the claim on the rates assessed by Sh.Kaushal cannot be said to be against Clause 12(ii). The award on items 16,29 and 34 is therefore upheld.

(iii)Item No.33:

This claim relates to steel work. No contest to the amount awarded under this head was made at the time of arguments and therefore this award is upheld.

(iv)Item Nos.16, 18, 21 and 26:

In respect of all these awards the Arbitrator while making the awards has given reasons only in the following terms:

> "I have gone through the analysis of rates given by the respondent Board and have considered the discussions and

> arguments placed before me during arbitration proceedings by the parties."

The language employed is identical in respect of all four items. It has been argued on behalf of the objector Board that no reasons have been given by the Arbitrator. On the other hand Sh.J.L. Gupta has urged that these awards were for small amounts and the arbitrator was a technically qualified man and therefore it was not necessary for him to give detailed reasons. As per the Act of 1996 reasons have to be given in any award. The Apex Court in **Union of India vs. Mohan Lal Capoor and others, (1973) 2 SCC 836,** has laid down as follows:

> "28……..Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decision recorded be shown to be manifestly just and reasonable….."

In **Jajodia's case** (supra) the apex Court clearly laid down that just setting out the conclusions upon the questions or issues that arise in arbitration proceedings without discussing the reasons for reaching the conclusions does not make an award a reasoned award. In all the aforesaid claims no reasons whatsoever have been given as to why the Arbitrator did not agree with the analysis of rates given

by the Board. He has just awarded amount under the various heads without giving any reasons whatsoever.

The Act of 1996 clearly requires that every arbitral award should be a reasoned award unless the parties have agreed otherwise. This is a very laudable provision. No doubt arbitration proceedings are a means of getting cases decided quickly and without entering into the detailed legal niceties. However, every party should know why his claim has been accepted or rejected. The award need not be very detailed but there must be sufficient reasons given for the party or the Court to decipher as to why the Arbitrator awarded the amount. I am constrained to observe that the reasons given by the Arbitrator in these four claims are no reasons in the eyes of law. The mere fact that the Arbitrator is a Chief Engineer or that the amounts involved are small is no ground whatsoever to violate the provisions of the Act and give no reasons. If reasons are required, they must be given whoever may be the Arbitrator and whatever may be the amount involved. As such the award in respect of aforesaid claims is set-aside.

(v)Income-tax:

The Board had ordered recovery of Rs.17,105/- as TDS out of the final bill of the Contractor. According to the contractor, TDS can only be deducted at the time of payment based on the net result of the award and not at the time of the part payment. According to the Board it is the statutory liability cast upon the Board to deduct income-tax at source under the provisions of Section 194 of the Income-tax Act. Sh.Bhogal submits that in case any excess tax has

been deducted or any refund is due to the contractor, it can approach the Income tax authorities.

On the other hand Sh.J.L. Gupta, appearing on behalf of the Contractor has submitted that income-tax could only be recovered after the final bills were settled. The conclusion arrived at by the Arbitrator is in the following terms:

> "The net result of the overall claims of the claimant and counter claims of the respondent of this arbitration as an award needs to be considered for TDS at the time of payment of the award. TDS at this stage is unwarranted and hence dismissed.
>
> I, therefore, conclude justify and award the recovery of TDS to be nil."

In my opinion, the finding of the Arbitrator is totally against the provisions of the Income-tax Act and is hence violative of the Public Policy of India. Section 194 of the Income Tax Act provides that at the time when any amount is credited to the account of the Contractor the person making the payment shall deduct an amount equal to 2% of such sum as income tax. TDS has to be deducted from every bill paid and it is not to be deducted only at the time of settlement of the final bill. The Arbitrator has not even taken into consideration the statutory provisions of law mentioned above and his award in respect of this item is set-aside.

(vi)Sales tax:

The contractor alleges that it has been filing its sales tax returns under the H.P. General and Sales Tax Act and they have been duly assessed by the authorities under the Act. It has challenged the

deduction of Rs.4,80,086/- out of the final bill towards sales tax. On the other hand the Board relies upon Section 12-A of the H.P. General Sales Tax Act which provides that every person making payment to a works contractor is bound to deduct 2% sales tax and surcharge on the amount paid or payable to the contractor.

The Arbitrator has come to the conclusion that since the contractor has already met with the liabilities at his own no amount could have been deducted from the final bill on account of the sales tax. Here again the Arbitrator has not even considered the provisions of law. His award is devoid of any reasoning. A legal duty is cast upon the Board to deduct sales tax. In case the contractor had paid the sales tax he could easily seek refund from the assessing authority. The Board being statutory liable to deduct this amount was fully justified in deducting the amount from the final award. The award of the Arbitrator in respect of this item is also totally illegal, against the statutory provisions and therefore against the public policy of India hence set-aside.

(vii) Recoveries on account of materials:

A)Cement: The arbitrator has allowed recovery of 69 bags of cement only as against 11,000 bags. With regard to 9907 bags the amount has been adjusted in the award dated 12.11.2001 passed by Sh.S.R.Khidta. The award of the Arbitrator on this count is therefore justified and calls for no interference.

B)Structural steel: The contractor has claimed that 15.00 MT of structural steel was washed away in flashy (sic) (probably the arbitrator meant flash) flood which was a natural calamity which

took place on 12.7.1994 and the Board have not has not taken this into consideration. The conclusion of the Arbitrator is that due to flash floods 15 MT structural steel was washed away and 7.118 MT as shown by the Contractor to have been used for bonafide purposes incidental to the main work is permissible. He has, therefore, rejected the recovery of 15.9827 MT of structural steel at penal rate and disallowed the deduction of Rs.47,552/- made by the Board.

It has submitted by Sh.Bhogal that this award is contrary to Clause 29-A of the agreement. Clause 29-A of the agreement reads as follows:

> "Clause 29-A: FORCE MAJEURE:
>
> Subject to the terms of the contract herein agreed, neither party shall be liable to the other for, any loss or damage occasioned by or arising out of acts of GOD, and in particular un-precedented floods, volcanic eruption, earthquake or other convulsion of nature and other such acts, such as invasion, act of foreign countries, hostilities or warlike operations, rebellion, riots military or usurped power which prevent performance of the contract and which could not have been foreseen or avoided by a prudent person.
>
> The contractor shall, when ordered in writing, by the Engineer-in-Charge, remove the damaged/destroyed work and rectify/reconstruct the same and shall be paid at the rates in accordance with provisions of the contract and he shall be allowed such extension of time for completion of the work as is considered reasonable by the Engineer-in-Charge, provided such damage is not attributable to the default, lapse, bad workmanship or lack of foresight on the part of the contractor."

In my view, Clause 29-A is not applicable in the present case. A perusal of the said clause shows that in case of loss or damage occasioned or arising out of an act of God neither party would be liable to the other party. This does not mean that because of the loss suffered by the contractor deduction can be imposed upon him. All it means is that no party will claim damages from each other. The award of the Arbitrator on this count is therefore justified and is upheld.

C)Gelatine and Electrical detonator: With regard to gelatine and electrical detonators no dispute was raised before the Arbitrator and therefore the award of the Arbitrator in respect of these items is upheld.

D)Recovery of energy charges: As per the terms of the contract agreement electric power was to be supplied to the contractor by the Board. The agreement further provided that 90% of the power shall be deemed to have been consumed for construction purposes which shall be charges as per 'E' schedule bulk supply and the remaining 10% will be treated to be general lighting for domestic purposes and charges as per 'A' schedule domestic supply.

According to the claimant the Board had issued it a bill for energy charges amounting to Rs.4,55,646/- and the contractor had contested this on the ground that it is only liable to pay Rs.1,61,110/- and not the amount claimed by the Board.

The finding of the Arbitrator are as follows:

> "I have gone through documentary/oral submission given by the parties during the proceeding. The amount of

Rs.1,61,110/- worked out by the claimant under clause 8.17 of Chapter VIII of the contract agreement hold good and is correct which is allowed to be recovered from the final bill."

Mr.J.L.Gupta has argued that electricity was to be supplied at fixed rates and this can easily be demonstrated and calculated. This demonstration, should have been done by the Arbitrator while adjudicating upon the claim. Since the Arbitrator has not given any reasons which he is required to do under law the award on this count cannot be sustained.

The Arbitrator has given no reasons for reaching his conclusion. He has not given any reason why he has accepted the calculations given by the contractor and rejected those given by the Board. Therefore, the award in respect of this item is without reasons and is set-aside.

E)Recovery of excess payment:

According to the Board the amount of Rs.11,46,424/- has been paid to the contractor in excess and therefore the recovery of the same has rightly been effected from the final bill under Clause 10-c of the agreement. The case of the Board is that when on 31.3.1995 the Engineer-in-Charge reviewed the progress of the work it was found that the contractor had made dismal progress. The contractor was served with show cause notice and part of the awarded work was taken over by the respondent Board as has already been detailed above. It is submitted that the contractor had been made payments

by granting him escalation but since it has now been found that the contractor is at fault the Board can recover these payments. It is further submitted that the extension granted upto 30.9.1995 vide letter dated 24.11.1995 clearly stipulated that the Board was entitled to recover the liquidated damages etc.

On behalf of the Board it is submitted that as per Clause 10-c the price variation shall remain operative only for the contract period and in case the work is delayed due to the fault of contractor or negligence the contractor shall not get any benefit under clause 10-c.

Clause 10-c reads as follows:

> "c)Clause 10-c pertaining to price variation shall remain operative for the contract period as stipulated in this contract or authorised extension(s) thereof. In case, the work is delayed due to contractor fault or negligence, the contractor shall not get any benefit under the said clause 10-c for the period of such delay."

I have already held that the respondent Board was not justified in taking over the Project from the contractor since the contractor was not solely to blame for the delay in the project. Therefore, he was definitely entitled to escalation which was paid to him and the recovery made was not correct and the Arbitrator has rightly set-aside the recovery.

Once I have come to the conclusion that the delay was not due to the fault or negligence of the contractor obviously the aforesaid clause is not attracted. The award of the Arbitrator under this head is, therefore, justified and upheld.

F)Recovery on account of excess payment on machinery and labour account: In the final bill the Board has sought to recover a sum of Rs.23,865/- and Rs.60,630/- from the contractor on account of machinery and labour. The case of the Board is that this amount is due to it on account of machinery and labour supplied by the Board to the contractor and utilised by the contractor during the course of the execution of the work. The conclusion of the Arbitrator is as follows:

> "On the scrutiny of the documents and pleadings by both the parties and on hearing discussions on the issue. The recoveries have no where been show/effect at intermediate stages and no correspondence with the claimant in this regard has been put-forth.
>
> Recoveries have been shown in the final bill unilaterally. I do not find reasonable grounds to establish the recovery from the final bill. The recovery is uncalled for and is dismissed."

A perusal of the aforesaid conclusion shows that no reasons have been given by the Arbitrator. He has not made reference to any documents produced by the parties. Merely because the recoveries were not shown during the intermediate stage is not a sufficient ground to hold that the same was false. The Arbitrator was bound to scrutinise the evidence and thereafter given his findings. Therefore, the award under this head is set-aside.

G)Escalation: The claim of escalation of the contractor is based on the letter of the HPSEB fixing wages dated 7.6.1995 referred to above. The Arbitrator has held that price escalation in labour cost has to be calculated by taking into account the aforesaid letter. I

have already held while dealing with OMP(M) No.15 of 2000 that this finding is totally incorrect. The Arbitrator has not at all considered the judgment of this Court in **Hydel Construction Case (supra)** which has been upheld by the apex Court. The letter of the Board did not fix the minimum wages. The minimum wages were only fixed by the notification issued by the State Government on 18.1.1997 whereby the minimum wages were revised w.e.f. 1.3.1996. Therefore, the award of the Arbitrator in so far as he has granted escalation on account of labour by applying the letter dated 7.6.1995 is set-aside.

H)Award on account of extra cement used and escalation thereupon: The award of the Arbitrator in so far as he has relied upon the award dated 7.9.1999 while analysing the rate per bag of cement at Rs.107.11 during October, 1992 for use of extra cement clause call for no interference and the award of Rs.2,01,915/- is upheld. However, the award of Rs.95,893/- based on increase in labour charges on account of notification dated 7.6.1995 is set-aside. Therefore, as against the award of Rs.34,16,177.81 the Contractor is only entitled to Rs.14,89,045.50.

I)Release of bank guarantee: Since I have held that the delay in the Project is not attributable to the contractor the award of the Arbitrator that the bank guarantee be released in favour of the contractor is upheld.

J)Claim on account of rehandling of material beyond power house to intake works, surge shaft and penstock heading:

The contractor claims that due to the steep gradient of the road and improper maintenance of approach road beyond Power House to

the intake works, head tunnel, surge shaft and penstock heading at the Project he could not achieve the expected out-turn and had to spend extra money for carriage, loading and unloading of material. The Contractor claimed a sum of Rs.14,20,363/- on this account and also claimed interest 24% p.a. on this amount. The stand of the Board is that the claim is not maintainable and according to the terms of the agreement itself it was clearly mentioned that the Project is situated in District Kangra at a distance of 80 km from Pathankot. The entire location of the Project was given and the contractor entered into the contract with open eyes. Close 3.3.2 of Chapter-II of the Brief Description of the Project reads as follows:

> "2.3.2. The project areas is approachable from Shahpur (On pathankot Chaki Madi Road as well as from Dharamshala). From Shahpur the approach is along mettled Shahpur Dharamshala road upto Garoh Village. Further, the approach to power house sits is through 5 km long kacha project road. From Dhramashala the approach is connected by a mettled road upto dul lake and further partly by a kacha road and then by foot track. Different project components sites are proposed to be suitably connected with the power house road to facilitate construction. The nearest railway station on Broad gauge is Pathankot about 80 kms. From village Garoh and on narrow gauge is Kangra about 30 kms from Garoh."

The Arbitrator held as follows:

> "The figures of the claims have been substantiated from the statements, which have been produced by the claimant.
>
> The justification given by the respondent in the reply to the claim of the claimant is not enough to dismiss the claim out rightly. The respondent neither have put forth

> any comment on the improper maintenance of approach road nor he has objected to the figures of the claim.
>
> It is accepted that the claimant was made clear with respect to the location as well as approach to the project, but it does not absolve the respondent from the responsibility of maintaining the approach road in good condition for the running of the loaded vehicles in a manner with full load of material. The respondent can not be allowed to make good use of his above said reply to nullify the claim of the contractor.
>
> I am of the considered opinion that the claimant must have rehandled the material beyond power house and the claim is sustainable.
>
> …….
>
> I conclude, justify that claim is partly sustained and award 80% of Rs.14,20,363/- i.e. Rs.11,36,290.40 only in favour of claimant to be paid by the respondent. Interest claimed by the claimant amounting to Rs.6,94,419.00 is dismissed."

In respect of this award it may be submitted that the same is neither based on any evidence nor it is provided under the terms of the contract. Clause 2.3.2 quoted above clearly shows that there was kacha road and also foot track. In the contract it was only mentioned that the different project sites are proposed to be suitably connected with power house road to facilitate construction. There was no stipulation that the said road was to be a metalled road. The Arbitrator has not discussed any evidence worth the name to come to the conclusion that the road was not properly maintained by the Board. He has come to this conclusion without discussing any evidence or material whatsoever. The Arbitrator has not even given

any reasons as to how he has reached the conclusion that the claimant is entitled to 80% of the amount claimed. This portion of the award in my opinion is not based on any tangible reasons and is therefore liable to be set-aside and is hereby set-aside.

K)Payment due to loss caused to the contractor for long over-run period:

The contractor claims that because of the contract period being extended from time to time as aforesaid his tools, plant, machinery and equipment remained on the site for an extra period of more than almost 4 years and has claimed Rs.58,93,351/- on this count. The Board submitted that the claim put forward by the contractor was not correct. According to the Board the delay in the completion of the work was wholly attributable to the contractor. The Board took up the plea that though the work was to commence on 7.3.1989 but the contractor only commenced the work on 26.5.1989. The Board alongwith its reply submitted a large number of documents as Annexures R-7 and R-8. Annexure R-7 consists of 53 documents which are the working programmes submitted by the contractor. These working programmes themselves show that the contractor was not working as per the schedule. Annexure R-8 consists 101 documents. Most of these are letters and other communications written by various functionaries of the Board to the Contractor that the work is not progressing satisfactorily. These communications start from September, 1989 and continued till 24.10.1995. According to the Board the delay was on the part of the contractor

only. The claim of the contractor has been dealt with by the Arbitrator and his conclusionis as follows:

> "Date of start at work was 8.3.89 and the stipulated date of completion as per the contract agreement was 7.3.92. the time period for the completion of work was three years. The work was actually completed on 25.3.1996. There was a over run period in completion of the work w.e.f. 8.3.92 to 25.3.96.
>
> Time extension for the completion of the work has been granted by the respondent Board upto 30.9.95 with escalation.
>
> Time extension with escalation for the period 1.10.1995 to 31.3.1996 have been adjudicated and decided under this arbitration which have been allowed.
>
> Grant of time extension is subjected on ground of the contractor having been unavoidably hindered in the execution of the work under the terms of contract.
>
> Thus the over run period w.e.f. 8.3.92 to 25.3.1996 for the completion of the contract does not attribute reasons of delay to the contractor/claimant.
>
> The respondent board took over some work from the claimant contractor during 7/95 by alleging the claimant contractor for not achieving the required progress vide Chief Engineer (Project) letter no.CEP/GAJ/Tender/94-95-6406 (camp Dharamshala dtd.12.7.1995).
>
> I have gone through the submission in detail and I am of the considered opinion that the action taken by the respondent board to take over the balance works, was unwarranted, uncalled for and thereby a breach of contract.
>
> The implementation of this order at a stage when the work were nearly on completion disturbed the claimant contractor who had raised the infrastructure arranged experts equipment and establishment to finish the taken over works also, were certainly put to losses and damages.

> From above, I conclude and justify that T&P, machinery and equipments etc. deployed by the claimant contractor remained under utilized on the project. On account of the over run period, the claimant must have undergone extra financial burden for which the claimant is due for compensation and the claim of claimant is sustainable.
>
> I have examined the claim substantiated by the claimant in his statement enclosed with the claims to be very reasonable. I conclude justify that the claim is partly sustained and award Rs.40,00,000/- (Rs.forty lacs) in favour of the claimant to be paid by the respondent."

It is apparent that the reasoning of the Arbitrator is that since extension was granted from time to time by the Board, therefore, it must be held that the contractor has been unavoidably hindered in the execution of the work. The reasoning of the Arbitrator is totally perverse. The Arbitrator has not considered the specific evidence i.e. the hundreds' of documents attached as Annexures R-7 and R-8 with the reply of the Board that the contractor had contributed to the delay. Grant of extension of time does not mean that the Board was at fault. Time could be extended for various reasons and it was not necessary that time was to be extended only if the Board was at fault. It may be true that the contractor may not be totally at fault. Even if this fact is accepted, to claim damages the contractor should have proved that the delay occurred due to the fault of the Board. The Arbitrator has not even arrived at such a finding. Without arriving at the conclusion that the Board was at fault no amount could have been granted as damages.

It is settled law that damages have to be proved by the person claiming damages. The person claiming damages must also prove that all steps were taken to mitigate the damages. In this behalf reference may be made to **Maula Bux vs. Union of India, AIR 1970 SC 1955,** wherein the apex Court clearly held that in cases of breach of contract damages can be determined in terms of money and the party claiming compensation must prove the loss suffered by him.

On behalf of the Contractor Sh.J.L. Gupta has attempted to justify this award by stating that it cannot be said that the Arbitrator has acted illegally or against the public policy in coming to the conclusion that the Board is guilty of negligence. He has also submitted that even if two views are possible then also no interference is called for.

In my opinion this item of the award shocks the judicial conscious of the Court. The Arbitrator has virtually presumed negligence on the part of the contractor. While dealing with OMP(M) No.15 of 2000 I have mentioned that the contractor while claiming various amounts in the Arbitration Case No.1 of 2002 had clearly stated that the delay after June, 1994 was not attributable to the contractor but occurred due to the fact that there was abnormal monsoon and floods during June, 1994. The contractor also had submitted that the work was delayed since the security clearance for the Kashmiri labourers employed by the contractor on the Project took unduly long time. The contractor had also set up the plea that there were continuous rains in December, 1994, January and

February, 1995. Even in the present Arbitration Case No.67 of 2003 the Arbitrator has set-aside the deduction made by the Board in respect of 15 MT of structural steel washed away in the flash floods which was a natural calamity. Why, all these aspects which were taken to be natural calamities while considering the claim of the contractor by the Arbitrator were not taken to be natural calamities while considering the delay attributable to the Board? Natural calamities remain natural calamities and cannot be attributed to any party. The Arbitrator also did not take into consideration the material evidence led by the Board. His conclusion which has been quoted above, clearly shows that he has not at all considered the contentions of the Board.

The Arbitrator has also not given any reasons whatsoever to come to the conclusion that Rs.40 lakhs should be awarded in favour of the Contractor. Why was the contractor not entitled to the full amount of Rs.58,93,351/- as claimed by him? On what basis did the Arbitrator arrived at a magical figure of Rs.40 lakhs? How did the Arbitrator assess the damages? All these questions remain unanswered in the award.

Another aspect of the matter is that a person who claim damages must also prove that he has taken adequate steps to mitigate the damages. Not an iota of evidence was led by the contractor in this behalf. It would also not be out of place to mention that all the extensions were granted at the instance and on applications having been filed by the contractor. It was the contractor who requested for

extension of time. This request was accepted by the Board. This also clearly indicates that the Board was not at fault.

For the aforesaid reasons I am of the considered view that the award of the Arbitrator awarding Rs.40 lakhs to the Contractor under this head is totally illegal, unconsciousable, arbitrary and against the settled principles of law and has been passed by totally ignoring material and relevant evidence and as such is violative of the public policy of India and is therefore liable to be and is hereby set-aside.

L)Payment due against the loss caused due to over run period of contract and because of watch and ward stall during over run period:

This claim is based on similar grounds as the previous claim and in this case also the reply of the Board was to the similar effect that it was not responsible for the delay in the completion of the Project and according to the Board a perusal of the documents attached as Annexures R-7 and R-8 it was apparent that the delay was attributable on the part of the contractor. The findings of the arbitrator in respect of this award are as follows:

> "Date of start at work was 8.3.89 and the stipulated date of completion as per the contract agreement was 7.3.92. The time period for the completion of work was three years. The work was actually completed on 25.3.1996. There was a over run period in completion of the work w.e.f. 8.3.92 to 25.3.96. Time extension for the completion of the work has been granted by the respondent Board upto 30.9.95 with escalation. Time extension with escalation for the period 1.10.1995 to 31.3.1996 have been adjudicated and decided under this arbitration which have been allowed.

Grant of time extension is subjected on ground of the contractor having been unavoidably hindered in the execution of the work under the terms of contract.

Thus the over run period w.e.f. 8.3.92 to 25.3.1996 for the completion of the contract does not attribute reasons of delay to the contractor/claimant.

The respondent board took over some work from the claimant contractor during 7/95 by alleging the claimant contractor for not achieving the required progress vide Chief Engineer (Project) letter no.CEP/GAJ/Tender/94-95-6406 (camp Dharamshala dtd.12.7.1995).

I have gone through the submissions in detail and I am of the considered opinion that the action taken by the respondent board to take over the balance works, was unwarranted, uncalled for and thereby a breach of contract.

The implementation of this order at a stage when the works were nearly on completion disturbed the claimant contractor who had raised the infrastructure arranged experts equipment and establishment to finish the taken over works also, were certainly put to losses and damages.

From above, I conclude and justify that T&P, machinery and equipments etc. deployed by the claimant contractor remained under utilized on the project. On account of the over run period, the claimant must have undergone extra financial burden for which the claimant is due for compensation and the claim of claimant is sustainable.

I have perused the claim statement certified by the statutory auditors for the administrative expenses during the over run period on this project enclosed with the statement of claims.

To be very reasonable, I conclude justify that the claim is partly sustained and award Rs.3000000/- (Rs.thirty lacs) in favour of the claimant to be paid by the respondent."

It is apparent that the reasoning of the Arbitrator is that since extension was granted from time to time by the Board, therefore, it

must be held that the contractor has been unavoidably hindered in the execution of the work. The reasoning of the Arbitrator is totally perverse. The Arbitrator has not considered the specific evidence i.e. the hundreds' of documents attached as Annexures R-7 and R-8 with the reply of the Board that the contractor had contributed to the delay. Grant of extension of time does not mean that the Board was at fault. Time could be extended for various reasons and it was not necessary that time was to be extended only if the Board was at fault. It may be true that the contractor may not be totally at fault. Even if this fact is accepted, to claim damages the contractor should have proved that the delay occurred due to the fault of the Board. The Arbitrator has not even arrived at such a finding. Without arriving at the conclusion that the Board was at fault no amount could have been granted as damages.

It is settled law that damages have to be proved by the person claiming damages. The person claiming damages must also prove that all steps were taken to mitigate the damages. In this behalf reference may be made to **Maula Bux vs. Union of India, AIR 1970 SC 1955,** wherein the apex Court clearly held that in cases of breach of contract damages can be determined in terms of money and the party claiming compensation must prove the loss suffered by him.

On behalf of the Contractor Sh.J.L. Gupta has attempted to justify this award by stating that it cannot be said that the Arbitrator has acted illegally or against the public policy in coming to the conclusion that the Board is guilty of negligence. He has also

submitted that even if two views are possible then also no interference is called for.

In my opinion this item of the award shocks the judicial conscious of the Court. The Arbitrator has virtually presumed negligence on the part of the contractor. While dealing with OMP(M) No.15 of 2000 I have mentioned that the contractor while claiming various amounts in the Arbitration Case No.1 of 2002 had clearly stated that the delay after June, 1994 was not attributable to the contractor but occurred due to the fact that there was abnormal monsoon and floods during June, 1994. The contractor also had submitted that the work was delayed since the security clearance for the Kashmiri labourers employed by the contractor on the Project took unduly long time. The contractor had also set up the plea that there were continuous rains in December, 1994, January and February, 1995. Even in the present Arbitration Case No.67 of 2003 the Arbitrator has set-aside the deduction made by the Board in respect of 15 MT of structural steel washed away in the flash floods which was a natural calamity. Why, all these aspects which were taken to be natural calamities while considering the claim of the contractor by the Arbitrator were not taken to be natural calamities while considering the delay attributable to the Board? Natural calamities remain natural calamities and cannot be attributed to any party. The Arbitrator also did not take into consideration the material evidence led by the Board. His conclusion which has been quoted above, clearly shows that he has not at all considered the contentions of the Board.

The Arbitrator has also not given any reasons whatsoever to come to the conclusion that Rs.30 lakhs should be awarded in favour of the Contractor. Why was the contractor not entitled to the full amount of Rs.67,00,272/- as claimed by him? On what basis did the Arbitrator arrived at a magical figure of Rs.30 lakhs? How did the Arbitrator assess the damages? All these questions remain unanswered in the award.

Another aspect of the matter is that a person who claim damages must also prove that he has taken adequate steps to mitigate the damages. Not an iota of evidence was led by the contractor in this behalf. It would also not be out of place to mention that all the extensions were granted at the instance and on applications having been filed by the contractor. It was the contractor who requested for extension of time. This request was accepted by the Board. This also clearly indicates that the Board was not at fault.

For the aforesaid reasons I am of the considered view that the award of the Arbitrator awarding Rs.30 lakhs to the Contractor under this head is totally illegal, unconsciousable, arbitrary and against the settled principles of law and has been passed by totally ignoring material and relevant evidence and as such is violative of the public policy of India and is therefore liable to be and is hereby set-aside.

M)Payment on account of retention of bank guarantee:

The arbitrator by holding that the contractor had to pay extra commission for the extended period of the contract has awarded Rs.1,50,000/- to the contractor under this head. In this case also the

finding of the Arbitrator that the contract was delayed due to the fault of the Board is totally illegal, arbitrary and not based on any evidence. The bank guarantee was extended as per the terms of the contract and therefore the contractor is not entitled to any amount on account of any commissions that it might have paid to the bank for extension of bank guarantee. This award is also rejected.

COUNTER CLAIMS BY THE BOARD:

As far as counter claims of the Board are concerned these have been rejected by the Arbitrator. The claim of the Board is basically based on the premises that the delay in the completion of the project was attributable to the contractor. For the reasons which I have already set out above it is clear that neither the contractor nor the Board could be held exclusively responsible for the delay. From the material on record it is obvious that the contractor was responsible for some portion of the delay. The Board also did not provide some material within time and contributed to some delays and some delays were not attributable to either party and occurred due to natural causes. Therefore, in my opinion neither party was entitled to any compensation on account of delay.

In view of the above discussion, all objections are disposed of in the aforesaid terms. Keeping in view the facts and circumstances of the case the costs shall be born by the parties.

January 9, 2007. **(Deepak Gupta),**
PV **Judge**